

**Testimony of Frederick E. Bragg
On Behalf of the Federal Bureau of Investigation Agents Association
Before the Subcommittees on Civil Service and Agency Organization
Government Reform Committee
United States House of Representatives**

**Time to Bite the Bullet: Fixing Federal Law Enforcement Pay and Benefits
July 20, 2004**

I. Introduction

Chairwoman Davis, Ranking Member Davis, and members of the Subcommittee, thank you for this opportunity to appear before the Subcommittee to testify about the urgent crisis in the pay and personnel system among federal law enforcement, particularly within the Federal Bureau of Investigation (FBI).

My name is Fred Bragg. I am a Special Agent in the FBI and the president of the FBI Agents Association (FBIAA), a non-governmental professional association with a membership of nearly 9,000 current and more than 2,000 retired agents nationwide. I am testifying today on behalf of the FBIAA, not as an official representative of the FBI. The FBIAA has been working with legislators, executive agencies, and other organizations to secure meaningful and necessary reforms to the pay and performance evaluation system for career federal law enforcement officers.

Let me begin by offering special thanks to both Chairwoman Davis and Ranking Member Davis for your hard work and leadership in support of legislation to address problems associated with law enforcement compensation. Your bipartisan leadership, and that of other members of the committee, is critical to our joint efforts. We truly appreciate all that you have done and are doing for the men and women who safeguard our homes, streets, communities, and country.

Allow me to also thank Congressman Mike Rogers, who has likewise been a leader in the effort to ensure the continued excellence and effectiveness of the FBI and other federal law enforcement agencies. We also express our appreciation to Senator Voinovich who has shown a determined commitment to federal law enforcement.

The professional staff of this subcommittee should also be recognized for their hard work and dedication. I first met them last year on an official trip to the Los Angeles FBI Office where they heard first hand of the situation effecting agents assigned to high cost of living areas. They are truly engaged in the topic and maintain regular communications with the stakeholders. They represent you well.

Madam Chairwoman and members of the subcommittee, the recently released report from the Office of Personnel Management (OPM), entitled *Federal Law Enforcement Pay and Benefits: Report to the Congress* (Report or OPM Report), acknowledges and confirms several important conclusions about deficiencies in the current pay and personnel system. However, its policy recommendations fall far short of the decisive legislative action that is needed to address current

problems before they undermine the ability of federal law enforcement agencies to fully protect the public. The FBIAA has heard from agents around the country about a range of severe financial problems that are resulting from the inadequacy of the current compensation system, and these financial strains are taking a toll on morale and performance.

FBI Agents are on the frontlines in our nation's battles against organized criminal networks, violent crime, and terrorism. Most Agents have come to serve their nation as a second career, bringing with them a wealth of experience, education, and expertise. Many Agents are trained accountants, lawyers, and scientists, and the sacrifices and financial burdens associated with obtaining these skills should be considered when making compensation decisions. If the compensation system is unable to consider the financial, emotional, and professional burdens on FBI agents, and other federal law enforcement officers (FLEOs), the FBIAA is concerned that eventually the ability of our nation to adequately protect U.S. citizens may be jeopardized. In light of these concerns, we think the recent OPM Report underscores the need for congressional action in its discussion of the *status quo*, but fails recognize the type of reform that is needed right now.

The recommendations included in the OPM report should be considered in the context of field investigation records, news reports, and the comments attached to this testimony that show the true nature of problems facing federal law enforcement and solutions that are available to legislators. Legislative proposals that can address the real problems facing federal law enforcement have been introduced and enjoy widespread bipartisan support. We hope the subcommittee finds itself in a position to take immediate action to address these critical federal law enforcement issues.

Below this testimony addresses OPM's findings, then OPM's recommendations.

II. Inadequacy of the Current Compensation System for FLEOs: OPM's Findings

The OPM Report is clear about one thing: the current compensation system does not work and needs to be reformed. The FBIAA agrees with this conclusion. OPM notes that the current system is broken and that it may be undermining the ability for federal law enforcement agencies to recruit and retain highly qualified individuals in many areas of the country. The OPM findings underscore the need for immediate reforms to the compensation system.

A. General Inadequacy of the GS System

The OPM Report erases any doubts that may exist about the dysfunctional nature of the General Schedule as it is applied to FLEOs. The Report concludes that "[t]he GS basic pay system...is outdated, inflexible, market-insensitive, and performance insensitive. In particular, the GS classification and pay provisions do not function well for law enforcement employees."¹

¹ OFFICE OF PERSONNEL MANAGEMENT, FEDERAL LAW ENFORCEMENT PAY AND BENEFITS: REPORT TO CONGRESS, 25 (2004) [hereinafter *Report or OPM Report*].

Furthermore, the Report finds that the problems inherent in the current compensation system "harm morale, create staffing disruptions, and increase Government costs unnecessarily."²

The OPM Report also makes it clear that problems with the GS system are amplified when the system is applied to highly skilled FLEOs who perform very taxing job duties, such as FBI Agents. The report explains that "the GS system is focused on traditional white-collar work and may not adequately address or value factors that are important in law enforcement work, such as physical requirements, responsibility to use deadly force, the need to make critical split-second decisions without supervisory guidance, and the need to approach or remain in dangerous situations rather than retreat from them."³ FBI agents must grapple with all of the factors discussed, and as a result, the deficiencies in the GS system that OPM notes are particularly troublesome when applied to FBI agents.

B. Problems in High-Cost of Living Areas

In addition to the general problems associated with the GS system, the Report also finds that there are unique problems facing FLEOs employed in high cost-of-living areas of the country. The Report notes, "significant entry/developmental pay problems may exist in locations with very high labor rates, such as San Francisco, Los Angeles, and New York City."⁴

The GS system's inability to fairly compensate FLEOs in high-cost areas is undermining the performance and quality of law enforcement efforts in high-cost areas. For example, OPM recognizes that "recruitment problems" in high cost of living areas are likely resulting from insufficiency of compensation and that "severe disparities" may exist between local labor rates and the compensation of FLEOs in high costs cities.⁵

Inadequate compensation in high-cost areas can substantially undermine morale, retention, and the ability for FLEOs to serve the nation. As one FBI Agent assigned to New York City explained in response to an FBIAA survey about cost of living issues:

I joined the Bureau to save the world and be a part of the best law enforcement agency in the world. Now I'm just trying to save my family and provide for their future. I continue my career with the Bureau because I still feel a sense of duty and obligation to my country and in pursuing justice. My morale level is a Negative 1. The local and state police agencies...make considerabl[y] more money with better benefits and incentives than do SAs of the FBI. For being the "best of the best," we are paid worse than...law enforcement agencies in the area. This situation is continually growing worse and will ultimately cause irreparable harm to the Bureau, the Federal Government, and ultimately the United States of America.

² *Id.*

³ *Id.* at 31.

⁴ *Id.* at Appendix D, 8.

⁵ *Id.* at 41, Appendix D, 8.

Cities such as New York, Los Angeles, and San Francisco are uniquely vulnerable to criminal and terrorist threats, and Congress has a duty to ensure that federal law enforcement efforts in these cities are able to perform to their maximum potential. For this reason, the FBIAA urges Congress to take concrete and immediate action to address cost of living issues for FLEOs in high-cost cities. We applaud OPM's recognition that problems do exist for law enforcement efforts in some of our nations most populated and vulnerable areas. We believe that Congress should act as soon as possible to address this crisis.

C. Pay Compression

FLEOs, and criminal investigators such as FBI agents in particular, are subject to premium pay rules that place a cap on the amount of total pay those employees can receive. Investigators do not receive hourly compensation for overtime work, but instead receive a standard "availability pay supplement" of 25 percent which requires the officers to work unlimited overtime. This pay cap means that more senior investigators end up being paid the same amount, without regard to the salaries that these investigators have earned as a result of performance or seniority.

OPM, in its report, recognizes that this problem exists. In fact, the OPM Report states that "Pay is compressed in that employees can be entitled to different rates of basic pay, but receive the same total pay because of the cap...this problem is most visible with respect to GS criminal investigators who regularly receive a 25-percent availability pay supplement."⁶

However, the OPM Report does not explain the problems that result from pay compression. The report should have noted that pay compression results in a strong reluctance of criminal investigators to take on supervisory duties because they will not be compensated for those duties. The disincentive to assume supervisory duties prevents law enforcement agencies from being able to fully compensate deserving employees and deprives management of the expertise and leadership available from experienced and qualified FLEOs. Although the OPM Report concedes that there is a need for a "different approach" towards the capping of premium pay, the report offers no indication of what specific actions, outside of lifting pay caps, could be adopted to address the problem of pay compression.⁷ This is a significant failing of the report. The FBIAA supports H.R. 1676, which lifts the pay cap.

D. Conclusions about the *Status Quo*

OPM's Report finds that the current FLEO compensation system is inherently defective, fails to account for high-cost areas, results in pay compression, and needs to be reformed. The FBIAA supports these conclusions wholeheartedly. OPM's conclusions about the *status quo* should help encourage legislators to act swiftly to reform the compensation system by addressing immediate needs in high-cost areas and adopting concrete plans to develop a separate compensation system for FLEOs. Neither FLEOs nor the nation can afford to wait any longer to address these problems, **and the time has come for Congress to lead the way towards real reform.**

⁶ *Id.* at 51.

⁷ *Id.* at 56-58.

III. OPM's Policy Judgments

Given the strength of OPM's findings regarding the inherent deficiencies of the current FLEO compensation system, one would expect to find policy recommendations that call for speedy reform and include clear details about the nature of needed reforms. This is not the case. The policy recommendations included in the recent OPM Report are vague in nature and amount to little more than an attempt to expand the power and discretion of OPM.

In addressing the question of how to fix the problems with FLEO compensation that have been slowly eroding the morale and performance of federal law enforcement agencies, the OPM Report is clear on two points: 1) OPM should be solely responsible for determining what actions need to be taken; and 2) no reforms should be undertaken until OPM decides what actions are appropriate. Thus, OPM's answer to the pressing need for compensation reform could result in more delay, while FLEOs and the nation they protect wait for the Agency to decide what to do.

The FBIAA does not believe Congress should defer unilaterally to OPM on this critical issue of national importance. The FBIAA is fully prepared to work with OPM, and legislation supported by the FBIAA would give OPM significant input in the process of designing a separate, FLEO compensation system. While it is important that OPM maintain a full and active role in the development of such a system, the final system and its details should be a creature legislative deliberation.

A. Enhancing OPM Authority

The OPM Report is replete with calls for enhanced OPM authority. In fact, more power for OPM appears to be the solution to every issue discussed in the report. Rather than advise Congress on what actions legislators should consider taking to reform the GS system, OPM calls on Congress to delegate virtually all responsibility for details to OPM. As the cover letter to the report explains, "We recommend that Congress provide OPM with broad authority to establish a governmentwide framework for law enforcement retirement, classification and basic pay, and premium pay systems."⁸ In sum, the report calls on Congress to grant OPM virtually unfettered authority to determine everything from salaries, covered employees, pay ranges, governing principles, to performance systems.

The idea that enhancing OPM's authority is a cure-all for law enforcement compensation problems is the one consistent theme in the report. For example:

- How should the retirement system be reformed? The report states "we recommend that OPM be given the authority necessary to modernize LEO retirement benefits."⁹;

⁸ *OPM Report Cover Letter.*

⁹ *OPM Report at 8.*

- How should classification and basic pay issues be addressed? The report states "OPM should be given authority to establish a flexible basic pay framework for Federal law enforcement employees throughout the Government."¹⁰; and
- What changes can be made to solve problems associated with premium pay and premium pay caps? The report unsurprisingly recommends that "Congress give OPM regulatory authority to establish a framework of premium pay rules that would apply to Federal law enforcement employees throughout the Government."¹¹

OPM further criticizes legislation offering specific reform ideas, and instead offers only terms such as "flexible" and "appropriate" as policy guidance. The only clear result of following the Report's recommendations would be that OPM would be given an unlimited amount of time and discretion to design a new compensation system. Given the importance and severity of problems facing FLEOs, Congress should undertake efforts to specifically address cost-of-living issues, premium pay cap problems, and the need for immediate action towards developing a new compensation system. Terms such as "flexibility" provide cold comfort to FLEOs, and the citizens they protect, who are having difficulty making ends meet and law enforcement agencies having trouble recruiting and retaining top-notch employees. Congress should not defer to OPM's request for more power and unlimited time to address problems with FLEO compensation.

B. Using the DHS Personnel System as a Model

Given the broad authority requested by OPM in the report one would expect the report to also include specific discussions of a timetable that OPM could operate under or details on how the new system might function. Unfortunately, there is no timetable and the details discussed provide little guidance. The only meaningful details of how the new OPM-created system might function can be found in the report's endorsement of an approach modeled after the development of a personnel system for the Department of Homeland Security ("DHS") that focuses on an OPM-established framework including a "common structure of law enforcement occupations, a structure of bands or rate ranges for various levels of work, and provisions for establishing and adjusting those rate ranges."¹²

Pointing to the DHS personnel system as a model for all law enforcement is not an encouraging development. The DHS system was not designed with law enforcement needs in mind, does not have an actual track record to demonstrate its efficacy, and has taken years to develop. Law enforcement groups, such as the FBIAA, have argued strenuously that many features of the proposed DHS system, especially aspects touted as promoting "flexibility" and "performance," will not operate well in a law enforcement context, and may actually undermine crime control and national security objectives. As noted in the attached comments on the DHS system that

¹⁰ *Id.* at 26.

¹¹ *Id.* at 57.

¹² *Id.* at 26.

have been submitted to OPM by the FBIAA, such a system is not an appropriate guide for reform to the FLEO compensation.

One example of why the DHS system is an improper model for FLEOs is the concept of "pay for performance." The attached comments from the FBIAA discuss the flaws of this concept in detail, but it is vital that legislators understand that application of pay for performance to FLEOs is, among other things, counterproductive. A former Director of the FBI once said, "Cooperation is the backbone of law enforcement." Making the pay of agents contingent upon "performance" only means that agents will have less incentive to cooperate with each other and more uncertainty regarding their compensation. Complex federal law enforcement investigations are inherently cooperative in nature – any policy that supports an incentive for law enforcement to work unilaterally will jeopardize investigations, and by extension, national security.

Additionally, pointing to the DHS model for creating a separate compensation system provides little or no meaningful guidance regarding how the Agency would address the pay compression problems, high-cost areas, or the resulting recruitment and retention problems. Quite simply, other than enhanced OPM power, and a delay in meaningful reforms, the Report offers very little for those seeking to address problems associated with the GS compensation system.

C. Failure to Address Cost-of-Living Issues

As described earlier, the OPM Report concedes that the compensation system is producing uniquely harmful results for FLEOs living and working in high-cost cities. Despite OPM's recognition of this problem, the Report does not provide a workable solution to the problem. In fact, the Report recommends maintaining the same defective "job comparison" procedures that have allowed for the current problems to occur.

The OPM Report recognizes that the pay comparison procedures are inherently handicapped by variations between different types of FLEOS, and differences between federal and local law enforcement work. For example, the Report states, "not all law enforcement jobs are equal in terms of mission impact, scope of responsibilities, knowledge/skill requirements, training standards, market value, etc."¹³ Furthermore, the Report notes that differences between local and federal law enforcement responsibilities present "a particular challenge in making salary comparisons."¹⁴ In fact, OPM even admits that the limits on the pay comparison process are so severe that OPM "may be unable to find sufficient direct comparators for GS-13 Federal investigators."¹⁵

Despite the flaws in the pay comparison process, and the fact that inadequate compensation is undermining retention and morale in cities such as New York and San Francisco, the OPM Report offers no meaningful recommendations to address the problems. For example, notwithstanding the fact that OPM recognizes that there may be no comparable local law enforcement work that requires the same responsibilities and skills that are required of federal

¹³ *Id.* at Appendix H, page 1.

¹⁴ *Id.*

¹⁵ *Id.* at Appendix H, page 2.

criminal investigators, the report dismisses legislation that would allow consideration of cost-of-living issues, as opposed to making pay comparisons.¹⁶ This conclusion comes with no proposal to address the problems faced by FLEOs, ignores the report's own conclusions about the difficulty of comparing labor rates, and makes it impossible for OPM to determine the adequacy of current compensation because the report admits that "OPM was unable to conduct or contract for a comprehensive salary survey for this report."¹⁷

The FBIAA represents active and retired FBI agents who deserve to have their real costs of living considered, rather than having their compensation determined by inappropriate comparisons to local police officers. FBI agents have special skills, advanced educations, and have no control over where they are assigned to live and work. To continue to determine their compensations by looking at local officers is inaccurate and dangerous, because the flaws in such an approach are undermining the morale and performance of agents who are tasked with fighting national and international criminal and terrorist enterprises. The time has come for Congress to dictate specific, concrete, and guaranteed changes to locality pay in high cost areas in order to address problems that even OPM admits exist.

D. Flawed Methodology

The FBIAA is very concerned that OPM has used an opaque and insufficient methodology to reach their conclusions. As a result, their conclusions do not reflect the realities of FLEO life, and the data used to reach conclusions is incomplete.

OPM's methodology is opaque because the agency failed to consult any individuals or organizations actually involved with the groundwork of federal law enforcement. While OPM may have communicated with FBI headquarters, OPM did not meet with groups that maintain day-to-day communications with agents in the field. Making reliable conclusions about retention and morale is impossible without working from the ground up, and OPM's report reflects a fundamental disconnect from FLEOs in the field.

Similarly, the data used by OPM to support their findings is often flawed or incomplete. For instance, the OPM Report offers conclusions about pay comparisons while admitting that they did not conduct a full-scale comparison. The Report also asserts that recruitment and retention are not problems without analyzing quit rates by location, experience level or time on the force.

IV. Conclusion

The FBIAA understands that the recent OPM report is simply one step on the road towards real reform of the FLEO compensation system, and the report makes some valuable conclusions about the deficiencies of the *status quo*. However, the report offers no meaningful recommendations and very little comfort to FBI agents, and other FLEOs, who are struggling to make ends meet in high-cost cities while serving our country. The FBIAA has long been an

¹⁶ *Id.* at Appendix D, page 13.

¹⁷ *Id.* at Appendix H, page 3.

advocate for addressing both the short-term and long-term needs of FLEOs, and the recent OPM report sacrifices the very real needs of today at the altar of continued bureaucratic turf battles.

The FBI Agents Association will continue to work with Congress and agencies such as OPM to create a workable and efficient compensation system for FLEOs, and we appreciate the opportunity to continue our work with Congress to forge an effective and fair compensation system for federal law enforcement officers.

The FBI Agents Association

March 22, 2004

OPM Resource Center
Room B469
Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Re: FBI Agents Association Comments on Proposed Department of Homeland Security Human Resources Management System, February 20, 2004 (69 FR 8030).

Attn.: Docket # DHS-2004-001, RIN 3206-AK31

To Whom It May Concern:

The FBI Agents Association (FBIAA) appreciates the opportunity to submit comments on the proposed Department of Homeland Security (DHS) human resources management system (69 *Fed. Reg.* 8030 (February 20, 2004)). While FBI agents do not fall within the jurisdiction of DHS, it is our understanding from key decision-makers that the DHS system will serve as a model for the treatment of federal law enforcement officers (FLEOs) government-wide. Thus, as a population potentially affected by the DHS system, we are pleased to offer the following comments.

The FBIAA has been actively engaged in efforts to create a fair and rational compensation system for FLEOs who are serving our nation. Creating a better system will enhance national security by ensuring that we attract and retain the best and the brightest. It is important that the DHS personnel system is created with careful and proper consideration of how the decisions made in the process will affect law enforcement officers inside and outside of DHS.

The FBIAA is a professional association with a membership of nearly 9,000 current and more than 2,000 retired agents nationwide. The FBIAA was founded over two decades ago in response to the growing recognition that agents needed to join together in order to protect and advance the interests of agents both within the Bureau, as well as in the public domain. The FBIAA works diligently to promote and facilitate the intelligent, skillful, and efficient discharge of the professional duties of all FBI agents. The Association works hard to advance and safeguard the careers, economic interests, conditions of employment, and welfare of FBI agents and retired FBI agents. These comments are on behalf of the FBIAA, and should not be read as an official statement from the FBI.

We support the efforts of the Office of Personnel Management (OPM) and DHS to create an innovative new personnel system that can best serve the interests of our nation. There are many

aspects of the proposed personnel system that we support, and we understand and appreciate the time and effort that has been spent developing the proposed system. Despite these efforts, however, the FBIAA is deeply concerned about several aspects of the proposed personnel system. We believe that OPM and DHS should carefully consider several issues before the DHS system is implemented or applied to non-DHS FLEOs, such as FBI agents.

The demands on FLEOs, and FBI agents in particular, are unique and severe. As the DHS system is developed and implemented, it is vital to national security and public safety that OPM and DHS fully consider the viewpoints of those who are on the front lines of our nation's battles against crime, drugs, and terrorism. If, as many have claimed, the DHS system will be the model for reform in other agencies, a full analysis of law enforcement issues is especially important. The issues that the FBIAA proposes addressing include:

- The need for a separate compensation system for FLEOs;
- The importance of locality and special skills pay adjustments; and
- The drawbacks of "pay for performance" in a law enforcement context.

I. The Need for a Separate Compensation System for FLEOs

The FBIAA supports the creation of a separate FLEO compensation and evaluation system that takes into account the unique role FLEOs play in protecting the nation and the special skills required to complete that mission. First, we support removing the DHS employees from the general schedule (GS) because the GS does not advance the DHS's mission to protect the homeland. Second, the FBIAA generally supports the concept of occupational clustering within DHS and recommends grouping DHS's FLEOs together. First removing DHS employees from the GS then grouping certain types of employees together attains a similar end for which the FBIAA has been working: the creation of a non-GS pay and compensation system for all FLEOs. Based on much of the same logic, we would like to work with OPM to create a separate compensation and evaluation system for non-DHS FLEOs. We propose keeping the DHS and non-DHS systems distinct, but believe it is necessary to ensure that they work together and neutralize any incentive to work at one agency over another.

A. Creation of a Separate System

When Congress created the DHS, it directed and authorized the Department to develop its own homeland security personnel system. In essence, the members of Congress recognized that the GS does not advance the Department's mission "of protecting the Nation against future terrorist attacks." 69 *Fed. Reg.* 8030. The missions and functions of DHS are similar to those of the FBI and other federal law enforcement agencies. The rule's preamble states, "DHS analyzes threats and intelligence,...protects our critical infrastructure,...and implements other security measures." *Id.* at 8030. Not only do FLEOs, particularly FBI agents, share these responsibilities, but also non-DHS FLEOs have a greater burden: to protect the nation from all criminal threats. Of course, the vital role that DHS employees play in national security cannot be overstated. We support removing DHS employees from the GS and developing a compensation and evaluation system unique to their skills and DHS's needs. Likewise, the critical role non-DHS FLEOs play in protecting our nation from terrorist—indeed all criminal—attacks necessitates removing

FLEOs from the GS and developing a separate compensation and evaluation system for them as well.

B. Establishment of Occupational Clusters

The proposed rule changes the method by which federal employees are classified within DHS. Rather than lump all DHS employees into one system, the rule proposes establishing “occupational clusters by grouping occupations and positions that are similar in terms of type of work, mission, developmental/career paths, competencies, and/or skill sets.” *Id.* at 8037. The logic inherent in this description mirrors the reasoning the FBIAA has advanced on behalf of the creation of a separate FLEO compensation and evaluation system. Those who share unique work, goals, risks, and careers should be evaluated separately from others with different occupations and risks.

The occupational cluster approach serves as the defining feature governing compensation schemes and job evaluations. *Id.* Although the proposed rule does not identify which occupational clusters will be created, it is easy to see why clustering FLEOs makes sense. Law enforcement duties are unique in terms of the skills and obligations required of those who perform them. Moreover, the case for a separate pay system for FLEOs is neither new nor revolutionary. In the early 1990s, OPM and the statutorily chartered National Advisory Commission on Law Enforcement (NACLE) studied the issue of a federal law enforcement specific pay system. Both OPM and NACLE concluded that a separate system should be created. Subsequent to reporting these findings to Congress, however, these recommendations were not effectuated due to a change in administration. The study recommending a law enforcement specific pay system was initiated during the first Bush Administration, completed in the Clinton Administration, and has received favorable reviews from various administration and congressional leaders.

As both Director of OPM Kay Coles James and Deputy Secretary of Homeland Security Admiral James Loy testified in a February 25, 2004 joint hearing discussing the proposed regulations, OPM is the agency tasked with ensuring that the reforms occurring at DHS align with the treatment of similarly situated employees at other agencies.¹⁸ All FLEOs serve this nation, and the public cannot afford to have some officers compensated more fairly than others. Unless great care is taken, there is the potential that the development of a new system covering DHS law enforcement jobs could cause an exodus of other FLEOs, such as FBI agents, to DHS.

Together, DHS and OPM are tasked with creating an effective model for personnel system reforms in other agencies. We encourage OPM and DHS to clarify the proposed regulations by specifying that law enforcement officers should be compensated separately, both within DHS and in other agencies.

¹⁸ *The Key to Homeland Security: The New Human Resources System*, Joint Hearing before Senate Committee on Governmental Affairs Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia and House Committee on Government Reform Subcommittee on Civil Service and Agency Reorganization, February 25, 2004 (no transcript available).

II. Concerns Regarding Locality and Special Skills Pay Adjustments

The proposed DHS system includes several types of pay adjustments for DHS employees. Of particular interest to FBI agents are the provisions relating to locality pay supplements and individual adjustments for DHS employees who possess special skills or competencies. *Id.* at 8038-39, 8055, 8057 The FBIAA supports efforts to fairly compensate employees living in high cost of living areas, as well as those employees possessing special skills and/or competencies. It is very important that OPM and DHS ensure that locality and special skills pay adjustments are implemented in a way that ensures certainty and does not promote internal competition among FLEOs.

A. The Importance of Locality Pay Supplements

Given the important and difficult tasks undertaken by DHS employees and non-DHS FLEOs, the FBIAA supports efforts to fairly compensate employees living in high cost of living areas. In cities such as the metropolitan areas of Los Angeles, New York, San Francisco, Boston, Chicago, Detroit, and the District of Columbia, compensation simply has not kept up with the cost of living. For law enforcement officers in these areas, the current GS pay scale is entirely inadequate to recruit and retain a highly skilled law enforcement workforce. As a result, FLEOs are increasingly forced to choose between providing for their families and protecting the nation.

While this may seem unfathomable, in certain areas, we actually have FBI agents who are forced to use housing assistance programs due to financial constraints. For example, the current salary for a newly hired FBI Special Agent in San Francisco is \$56,453, including all overtime payments. A search for a "low income" home within the commuting distance of San Francisco (60 to 90 minutes commute) placed the house in the \$300,000 range with a mandatory income of \$86,000 per annum. We urgently need to fix these pay and cost of living disparities.

As shown, FBI agents are uniquely aware of the need for locality pay supplements, and we applaud the inclusion of locality pay supplements in the proposed regulations. However, we object to leaving the determination of whether to provide a locality pay supplement to the sole discretion of the Department. Additionally, we believe the "pay comparison" methodology is flawed and propose a high cost of living analysis instead. Each are discussed below.

1. Locality Pay Supplements Should Not be Discretionary

The proposed regulations provide sole discretion to DHS to determine whether to provide a locality supplement, the amount of locality supplements, and whether employees qualify for those supplements. The proposed regulations provide that, "Within its sole discretion, DHS...may set and adjust locality and special pay supplements." *Id.* at 8055. Furthermore, while there is no provision requiring locality pay supplements to be issued, there are provisions that actually limit the availability of such supplements, such as the provision that conditions qualification for such supplements on an employee's performance rating. *Id.* Linking locality supplements to a subjective performance rating undermines certainty and incentivizes internal competition among employees. In a law enforcement context, both can devastate a FLEO's ability to successfully investigate crime.

The way the proposed regulations are drafted there is no assurance that compensation for DHS employees will keep pace with rising costs of living, because there is no requirement that such locality pay supplements be issued. This scheme creates uncertainty, undermining the ability for DHS employees to plan their finances because there is no guarantee that their salary will keep pace with the cost of living. This combination of factors could rapidly lead to recruitment and retention problems in high costs of living areas. FBI agents have seen this phenomenon occur in our agency and recommend creating a locality supplement system that ensures certainty by linking the locality supplement to a high cost of living index, as discussed below.

It is vital that locality pay supplements be a predictable component of the DHS compensation system, and that any application of the DHS system to other agencies not include unlimited agency discretion. Our national security cannot afford the risks that result from inadequate compensation in high cost of living areas. Sufficient locality pay supplements are not a matter of convenience, they are an absolute necessity if our federal law enforcement agencies are going to be able to guarantee that the most skilled and qualified employees can work in the areas that most need their services: expensive metropolitan areas.

2. The "Pay Comparison" Model Should Not Be Used to Determine Salaries or Locality Pay Supplements

The proposed regulations are unclear as to the particular methodology that should be used to determine the amounts of locality pay supplements, and provide only that "OPM may consider mission requirements, labor market conditions, availability of funds...and other relevant factors." *Id.* While the FBIAA supports looking to many of these variables, we object to the use of "labor market conditions." During the February 25, 2004 hearing on the proposed DHS regulations, Comptroller General of the Government Accounting Office David Walker stated that locality pay supplements for law enforcement officers could be determined by looking at compensation rates for local law enforcement officers in the localities in question.¹⁹ Thus, locality pay for law enforcement officers under the new DHS system could be determined by using the old "pay comparison" method used in the GS system. Our research indicates that this method is flawed, and we believe the creation of a new system should move away from pay comparison. Rather, we suggest adopting a high cost of living analysis to determine locality supplements.

The FBIAA proposes looking at the real cost of living to determine what the cost of living, or locality, adjustment should be in each metropolitan area. We rely upon the cost of living analysis of the Chamber of Commerce's research arm to determine what cities require adjustments and to set the level of each adjustment. The Chamber of Commerce cost of living index is highly regarded and widely used by the private sector, the President's Council of Economic Advisors, and the United States Census Bureau. This index captures and analyzes the cost of living across the nation based on real costs for consumer goods and services ranging from health care to groceries to housing. If this formula were to be put into place, it would go a long way towards establishing pay equity across the country and encouraging sound personnel management practices.

¹⁹ *Id.*

By comparison, the manner in which locality rates are calculated for FLEOs is out of step with reality. OPM calculates these rates on the basis of the labor market for comparable nonfederal and private sector jobs. This process results in flawed comparisons, because federal law enforcement work, and the skills of those individuals who perform the work, do not have comparable counterparts on the local level. For example, in determining wage rates for FBI agents, OPM uses deputy sheriffs as the comparable nonfederal job category. However, FBI agents as a rule require four-year college degrees, often possess advanced degrees, and enter the FBI at older ages, typically after a prior career with significant professional experience. In other words, the OPM's wage comparison greatly undervalues our agents.

The "pay comparison" model is also flawed because it ignores a variety of significant variables relevant to compensation. To meaningfully compare local and federal compensation for FLEOs, a variety of additional factors should be considered, which fall under the broad categories of "Job Qualifications" and "Job Benefits" and are discussed below. By undervaluing federal law enforcement, the proposed compensation system may undermine morale, recruitment, and retention goals.

a. Job Qualifications

The current "pay comparison" methodology compares FLEO compensation to salaries for entry-level local police officers. The results of these comparisons are misleading because they do not reflect the different qualifications possessed by starting local police officers and starting FLEOs.

FLEOs in general, and FBI agents in particular, have professional degrees and come to federal law enforcement as a second or third career. Additionally, FLEOs routinely use sophisticated investigative techniques and are responsible for dangerous law enforcement work related to organized crime, national security, and counter-terrorism. This expertise and education carries with it substantial economic costs and has an economic value that makes its consideration necessary in any discussion regarding pay equity.

Because FLEOs are required to be more highly educated in order to perform complex job duties, any salary comparison should include a comparative analysis of job qualifications. Relevant variables include:

- Level of education;
- Experience;
- Average or required age;
- Assignment availability/mobility requirements;
- Specialized expertise (language, technical skills, etc.);
- Vision/hearing requirements; and
- Length of required training.

If these variables are included in an attempt to identify a comparable job at the local level it will likely result in the conclusion that there are, in terms of required skills or qualifications, no local law enforcement jobs that are properly comparable to work as a FLEO. To accurately determine pay, it is necessary to move beyond the "pay comparison" model and compensate DHS law enforcement

officers, and other FLEOs, based upon a fair salary that it is adjusted for the real cost of living in the areas in which they work.

b. Job Benefits

The second reason that the "pay comparison" approach fails for FLEOs is because salary comparisons, standing alone, do not properly portray the full scope of compensation. To accurately compare compensation, it is necessary to collect and compare information on the types of benefits that are provided to local/state and FLEOs.

Differences in benefits can substantially change the real economic value of a compensation package, and the current pay comparison approach does not fully consider the impact of benefits on compensation equity. For example, while the current approach utilized by OPM does consider the 25 percent availability pay ("AVP") paid to FLEOs, it does not take into account the fact that FLEOs cannot receive any overtime pay in addition to the AVP. It is common for state and local LEOs to supplement their base pay by up to 50 percent in the form of overtime pay. Thus, failing to consider overtime benefits results in a skewed comparison of compensation.

Another aspect of compensation that needs to be considered is the economic value of retirement benefits. For retirement purposes, after 20 years of service FLEOs receive 34 percent of their salary (based upon a three year average) with AVP, and a one percent per year increase for every year of service over 20 years. In comparison, many localities provide benefits that pay from 60 percent to 90 percent of salary (based upon the single highest salaried year) with overtime and shift differentials included in that amount, and lucrative cost of living increases. These differences can represent many thousands of dollars of value to employees and have very real impacts on retention, morale, and the equity of a compensation system.

If a fair method for comparing compensation is going to be implemented at DHS, and applied subsequently to FLEOs in other agencies, the following benefits should be considered:

- Health Insurance (Medical, Dental, Vision, etc.);
- Vacation/Holiday time;
- Uniform allowances;
- Education bonuses (offset or not against salary);
- Pension plans;
- Overtime pay (including whether there is a cap on overtime pay);
- Life insurance and/or disability insurance;
- Annual cost of living adjustments; and
- Housing offsets.

In sum, the FBI/AA finds the continued reliance upon the "pay comparison" approach to compensation to be faulty. The creation of a new personnel system for DHS provides an excellent opportunity to build a compensation system for FLEOs that is properly calibrated to account for the fact that job qualifications, responsibilities, and benefits provided to local and federal law enforcement differ in degrees that make fair pay comparison functionally impossible.

D. Special Skills Pay Adjustments

The proposed regulations provide for the establishment of "special skills payments" which are intended to compensate employees for "specializations for which the incumbent is trained and ready to perform at all times." 69 *Fed. Reg.* at 8057. The summary of the proposed regulations explains that these payments "are designed to adjust individual pay levels based upon the acquisition and assessment of competencies, skills, and knowledge," and that special assignment payments will be available to employees who undertake "assignments of greater difficulty or complexity." *Id.* at 8039. However, as with locality payments, the issuance of such payments remains within the sole discretion of DHS. *Id.* at 8057 ("Special skills payments are not basic pay for any purpose and be terminated or reduced at any time without triggering pay retention or adverse action procedures.")

The FBIAA applauds OPM and DHS for embracing the concept that employees should be compensated for possessing unique educations and skills. FLEOs often possess advanced skills and degrees that deserve to be fairly compensated. If DHS, and other federal agencies such as the FBI, hope to recruit and retain individuals with the types of advanced skills that are required to investigate and pursue complex terrorist and criminal networks, then it is essential that these skills and job duties are accounted for in compensation packages.

For this reason, it is necessary that the provisions in the regulations regarding special skills and special assignments payments be clarified and made non-discretionary. The provisions need to specifically recognize that technical skills and the possession of advanced degrees count as "special skills." Furthermore, the term "special assignment" needs to be expanded to include assignments that require high-level skills, have a significant impact on national security, or otherwise demand the most qualified employees. Finally, if DHS and other agencies hope to recruit the finest available employees, compensation for special skills and assignments should be predictable and certain.

Federal employees, and FLEOs in particular, who possess special skills and serve on special assignments are providing unique services to our nation and making definite sacrifices in terms of their time and safety. These services and sacrifices deserve a firm promise of compensation. Fair compensation for employees with special skills should be guaranteed in order to make sure that our government is able to recruit, retain, and fairly pay the law enforcement officers who protect our citizens.

III. The "Pay for Performance" System Is Counterproductive for Law Enforcement.

In the proposed regulations DHS and OPM have decided to waive the provision of chapter 43 of Title 5 of the United States Code, "in order to design a performance management system that will...ensure greater employee accountability with respect to individual performance expectations, as well as organizational results." *Id.* at 8039. The proposed "pay for performance" system will condition market-related pay adjustments, locality pay supplements and other individual pay supplements such as special skills payments on evaluations of an individual's job performance. *Id.* at 8038 ("[T]hese pay adjustments will be provided only to employees who meet or exceed performance expectations.")

The FBIAA, and the agents who are members of the FBIAA, understand the need for employees to perform their tasks effectively, efficiently, and with honor. After all, we often depend upon our fellow

employees' performance to protect our lives and the lives of innocent citizens. However, the FBIAA is concerned about the application of a "pay for performance" system to FLEOs because such a system will likely be unworkable and counterproductive, as discussed below.

1. Pay for Performance Lacks Objectivity

The "pay for performance" is unworkable in a law enforcement context because there is not a fair and objective way to measure performance for FLEOs. FLEOs, and FBI agents in particular, work in teams, put in long hours, and share information and resources within the agency and with other law enforcement agencies. It is not clear what standards can be created to fairly measure performance in this context. The easiest way to measure success is by measuring the quantity of cases solved, crimes prevented, or criminal networks disrupted. However, if arrests or convictions are measured, then it will punish those who work on complex and long-term cases that take years to pursue, and often conclude with valuable information but little in terms of tangible arrests or convictions.

The proposed regulations provide no guidance as to what sorts of measures can or will be applied to law enforcement officers, and the FBIAA believes that there are no measures that are reliable, objective, and fair enough to warrant making them a condition for fair compensation.

2. Pay for Performance Undermines the Teamwork Necessary for Law Enforcement Work

In addition to the practical issue of how to measure performance, the FBIAA is concerned that application of a "pay for performance" to FLEOs in DHS, and potentially to FLEOs in other agencies, will have a negative impact on the law enforcement operations in these agencies.

First, the application of this system to FLEOs in DHS and other agencies will inject a competitive element into law enforcement operations. Effective law enforcement is built on a foundation of teamwork, cooperation, and information sharing. However, a "pay for performance" system fosters competition among employees because the system, in order to function, requires that some employees be credited with law enforcement success while others are not. When the entire range of compensation adjustments are passed through a performance filter, it is not difficult to foresee the difficulties that may arise in the law enforcement context. Employees will compete for information, cases, and credit. In law enforcement this type of competition creates a disincentive for cooperation between law enforcement employees and agencies, and those communication breakdowns undermine the safety of our nation and its citizens.

Second, FLEOs should not have their financial security connected to their arrests, convictions, or investigations. Connecting compensation and law enforcement operations may draw the credibility of FLEOs into question, both in the public forum and in courtrooms. It also creates a financial incentive for FLEOs to focus on quantity of law enforcement activity rather than quality. The credibility problem arises because the "pay for performance" system will have to rely upon indicators of performance such as convictions or arrests that will tie a FLEO's compensation to judicial outcomes, a fact that will surely be exploited by criminal defendants and their attorneys.

Third, a focus on measurable performance statistics creates an incentive for law enforcement officers to pursue large numbers of lower level criminals and terrorists, rather than spending the time and taking the risk of failure inherent in doing the complex and difficult legwork necessary to go after criminal and terrorist kingpins. FLEOs, and FBI agents in particular, are often barely able to provide for themselves and their families. If their locality pay adjustments and other pay supplements were conditioned on any of the conceivable measurements of performance it would create a perverse incentive for these employees to make sure they focused on short-term and easily attainable results (quantity) rather than long-term and risky investigations (quality).

FBI agents work in concert with DHS employees in the effort to investigate, capture, and prosecute criminals and terrorists before they have an opportunity to injure or kill our fellow citizens. OPM and DHS need to be very wary of introducing elements of competition that may undermine the credibility of law enforcement and create incentives for employees to avoid difficult and risky cases that are at the very heart of our battles against criminal networks and terrorist organizations.

If our nation is going to succeed in bringing down dangerous criminal networks all law enforcement employees and agencies will need to work together. The FBIAA urges OPM and DHS to reconsider the appropriateness of "pay for performance" in a law enforcement context. FBI agents have serious reservation about the operation of the system within DHS, and know the system would be counterproductive if applied to the FBI.

Conclusion

OPM, key legislators, and experts across the board have stated the new DHS personnel system will be a model for reform in other agencies. If this is the case, OPM and DHS need to consider the unique implications of the proposed personnel system for all FLEOs.

There is a pressing need to create a fair and separate compensation system for FLEOs. The FBIAA supports the proposed regulations provisions relating to locality pay adjustments and special skills payments, subject to the changes we articulated above. In the law enforcement context, "pay for performance" undermines teamwork and results in negative consequences for the investigation of criminal cases. We ask that DHS and OPM reconsider and reform these areas when developing a system for non-DHS FLEOs.

The law enforcement battle against crime and terrorism is vital, and the FBIAA and its member agents are resolved to protect our nation. A compensation system that is being touted as a model for other agencies needs to take account of the skills offered, and sacrifices made by law enforcement employees in the federal government. The current proposal has many positive first-steps but needs further refinement before it is applied in a law enforcement context.

The FBIAA appreciates the opportunity to comment on these regulations and participate in the process to design a compensation and personnel system that is best suited to protect our homeland.

Very truly yours,

Frederick E. Bragg

President